Editor's note: Reconsideration granted; decision reaffirmed -- See U.S. v. Braniff (On reconsideration), 65 IBLA 94 (June 23, 1982)

UNITED STATES
v.
GERALD H. BRANIFF

IBLA 81-420 Decided November 5, 1981

Appeal from decision of Administrative Law Judge E. Kendall Clarke, canceling homesite entry and rejecting application to purchase. F-20474.

Affirmed.

1. Alaska: Homesites

   Pursuant to the Act of May 26, 1934, 43 U.S.C. § 687a (1976), a homesite claimant must show that at the time of filing an application to purchase he had occupied his claim in a habitable house for the required length of time. Contruction of a cabin and uncorroborated statements regarding occupancy will not suffice to establish occupancy where there are substantial indications that the claimant did not intend to make the claim his home.

2. Evidence: Credibility of Witnesses -- Evidence: Weight
   Where the resolution of a case is influenced by the Administrative Law Judge's findings of credibility, which in turn are based on reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, the Board will not ordinarily disturb them.

APPEARANCES: Gerald H. Braniff, pro se; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Gerald H. Braniff has appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated February 2, 1981, canceling appellant's homesite entry, F-20474, and rejecting his application to purchase a tract of land of approximately 5 acres situated in protracted sec. 10, T. 10 S., R. 10 E., Fairbanks meridian, Alaska, on the east bank of the Delta River near Delta Junction.

Appellant's notice of location was filed on January 14, 1974, alleging that occupancy had commenced on December 2, 1973, but that no improvements had then been made. On September 15, 1975, appellant filed an application to purchase, alleging that an 8-foot by 10-foot "one frame building," with winter insulation and wood stove heating, had been constructed on the site and become habitable on February 1, 1974. He also stated that he had resided there from January 15, 1974, to February 10, 1974, and from November 22, 1974, to July 9, 1975, whereupon he moved to Fairbanks, Alaska.

On September 28, 1979, BLM filed a contest complaint charging that appellant had not occupied his homesite claim in a habitable house for not less than 5 months of 1 year. Appellant filed a timely answer and on March 10, 1980, a hearing was held in Fairbanks, Alaska, by Administrative Law Judge Clarke.

Appellant's application to purchase was filed pursuant to the Act of May 26, 1934, 43 U.S.C. § 687a (1976), which provides, in pertinent part: "That any citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form * * *." By virtue of a veteran's preference granted pursuant to section 1 of the Act of September 27, 1944, as amended, 43 U.S.C. § 279 (1976), appellant was entitled to a reduced occupancy requirement of 5 months in any one year. See 43 CFR Subpart 2096.

Based on evidence adduced at the hearing, the Administrative Law Judge concluded that appellant had not submitted "sufficient evidence to rebut the Government's contentions that the homesite has not been occupied substantially during the required prove-up period" (Decision at 6).

In his statement of reasons for appeal, appellant contends that, pursuant to section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1976), BLM had 2 years to initiate a contest and that "more than 2 years [had] passed." Appellant also argues that the Judge "relied on hearsay, assumptions and personal opinions," colored the testimony and written reports of BLM witnesses "[to] sound even better" and "ignored" most of appellant's testimony.

Section 7 of the Act of March 3, 1891, supra, requires the issuance of patent to an entryman "under the homestead, timber-culture,

desert-land, or preemption laws, or under the Act of March 3, 1891," where there is no pending contest or protest and 2 years have elapsed "from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land" under such laws. At the hearing, the Judge denied appellant's motion to dismiss on the basis of section 7 of the Act of March 3, 1891, supra, because that statutory provision does not apply to a homesite entry. We agree. See Grewell v. Andrus, Civ. No. A 76-270 (D. Alaska May 9, 1978), aff'g Lavonne E. Grewell, 23 IBLA 190 (1976).

[1] We turn to appellant's contention that the Administrative Law Judge improperly weighed the evidence presented at the hearing. Initially, we note that the Government contest complaint raised two issues, whether appellant constructed a "habitable" house and whether he occupied it for the requisite 5-month period of time within any one entry year. While the evidence presented at the hearing concerned both issues, the Administrative Law Judge did not find it necessary to rule specifically on the question of habitability. He concluded that appellant had failed to establish the necessary occupancy.

Appellant's contention that he satisfied the occupancy requirement rests essentially on the fact that he constructed a cabin possessing a certain amount of durability and his uncorroborated statements regarding occupancy of that cabin. Both the BLM field examiner who visited the claim on August 29, 1975, shortly after appellant left the site, and the BLM examiner who was there on August 9, 1978, testified that the cabin and surrounding areas of the claim bore little signs of use (Tr. 25-28, 54-60). Both examiners prepared land reports (Exhs. 2 and 3), and both recommended that the homesite entry be contested. There are no written statements or oral testimony by neighboring entrymen or others that appellant, indeed, occupied the homesite during the period claimed by appellant. Compare with United States v. Cooke, 59 I.D. 489, 497-98 (1947).

In a contest proceeding, the Government has the initial burden of establishing a prima facie case of noncompliance with the applicable law and regulations for homesites, whereupon the burden shifts to the applicant to show by a preponderance of the evidence that he has complied. See Stewart v. Penny, 238 F. Supp. 821, 831 (D. Nev. 1965); United States v. Boyd, 39 IBLA 321, 329 (1979), aff'd, Boyd v. Andrus, Civ. No. A 79-322 (D. Alaska, Mar. 14, 1980). A prima facie case was established by the testimony and reports of the BLM field examiners. United States v. Boyd, supra.

Appellant testified that his cabin is habitable (Tr. 131-35). When he lived on the homesite he was intermittently employed in and around the Fairbanks area from late January 1975 to late May 1975 (Tr. 146-49). Fairbanks is about 95 miles from the homesite (Tr. 136). He commuted from the homesite to his various jobs. The driving time was 1 hour 20 minutes to 2 hours -- one way (Tr. 152). He would leave his vehicle beside the road and in the winter walk across the frozen

Delta River or in spring and summer cross the river on a raft and walk to his homesite. He stated "it's about a mile and a quarter walk across the river after you get out of your car, maybe about a mile and a half" (Tr. 137). Appellant used a four-man 7-foot rubber raft to cross the river. He would partially deflate it to get it in his truck and when he returned from work he would blow it up to reinflate it (Tr. 151-53).

Appellant stated that at the time he resided at the homesite he had no other permanent residence. However, he did have a furnished trailer in Fairbanks where he stored his tools. He stated that he stayed overnight at the trailer 10 percent of the time (Tr. 138). Appellant got married in September 1974. His wife was employed in Fairbanks. He testified that she spent 25 percent of the time at the claim. When questioned about where his wife spent the rest of the time, he stated: "Well her permanent home was down on the homesite claim with me but when she was in town here [Fairbanks] we had a mobile home that we used for storage and business purposes and much of the time, she spent in that" (Tr. 155).

Appellant moved from his homesite on July 9, 1975, and thereafter lived in Fairbanks with occasional "trips" to his claim (Tr. 157).

In evaluating appellant's testimony the Administrative Law Judge stated:

> From observing Mr. Braniff on the stand, together with basic incredibility of a daily commute to Fairbanks from Delta Junction during the winter, I conclude his assertions that he commuted daily from the Fairbanks area during his proveup period from November, 1974 to July, 1975 is not creditable. Fairbanks is 95 miles away from the homesite. In order to get to his homesite he must cross the Delta River daily in a raft. He asserted he daily inflated and deflated this raft, which he transported in his truck. He has not submitted any corroborating evidence that he has in fact done such things. Moreover, Mr. Braniff admits he maintained a trailer in the Fairbanks area where he stayed 10% of the time. In September 1974, Mr. Braniff got married. His wife did not stay with him at the homesite more than 25% of the time. She stayed in the Fairbanks area where she worked. Nonetheless, Mr. Braniff argues that he faithfully returned to his small cabin during the prove-up period. The establishment of an off-entry dwelling by Mrs. Braniff establishes a rebuttable presumption against the applicant's good faith. United States v. Cooke, 59 I.D. 489 (1947). 1/ Given the intermittent use by the applicant, the lack of improvements on

1/ In Smith v. Croker, A-26189 (May 28, 1951), the Solicitor, in adjudging the validity of a homesite entry, adopted the concept of

the homesite, the lack of corroborating evidence submitted by the applicant, the off-entry residence established by his wife, I find the applicant did not intend in good-faith to comply with the homesite laws.
(Decision at 6-7).

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fn. 1 (continued)
settlement under the homestead laws as enunciated by the Supreme Court in Great Northern Railway Co. v. Reed, 270 U.S. 539, 545 (1926): "The term 'settlement' is used as comprehending acts done on the land by way of establishing or preparing to establish an actual personal residence -- going thereon and, with reasonable diligence, arranging to occupy it as a home to the exclusion of one elsewhere." (Emphasis added.) Similarly, in United States v. Cooke, supra at 502, the Under Secretary held, in connection with a homestead entry, that the entryman must not only reside on the land sought but intend to make it his home. In such circumstances, the mere fact that the entryman has two residences does not affect the validity of the entry. However, initially, the maintenance of two residences gives rise to a rebuttable presumption "against the entryman's good faith." United States v. Cooke, supra at 507. The presumption which arises "where the husband lives on the entry but the family does not * * * has generally been held overcome when the entryman not only has met all other requirements but by all his acts has evidenced good faith concerning his change of residence and has given acceptable explanations of the family's residence away from the entry." United States v. Cooke, supra at 509.

In certain circumstances, however, the presumption may become virtually conclusive. As further stated in United States v. Cooke, supra at 512-13:

"Of course, bad faith will always tip the scales against the entryman. In cases of double residence, where the presumption of bad faith raised by the circumstance of the family's residence away from the entry is confirmed by still other irregular circumstances, the entryman will not prevail. * * * The presumption is also held sustained when scrutiny of the entryman's acts shows his alleged observance of the requirements to be only colorable. Where there is evidence that the entryman's actual personal residence on the entry is defective in length or only intermittent or occasional, * * * his house inadequate, uninhabitable or uninhabited, that evidence is held to show that the entryman never intended to change his residence and make his home on the entry, but on the contrary intended to keep his home where the family continued to reside and to return there when he should have obtained title to the entry.

"In all such cases, deeds speak louder than words. The acts of the entryman determine the issue, and the explanations he gives for the family's residence away from the entry become of no worth, however meritorious in themselves apart from the circumstances, or however acceptable they might be to the Department if all else were regular."

[2] As we have noted in the past, the Board has authority to reverse the findings of an Administrative Law Judge, even when not clearly erroneous. However, where the resolution of the case is influenced by the Judge's findings of credibility, which in turn are based on the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, the Board will not ordinarily disturb them. United States v. McDowell, 56 IBLA 100, 105 (1981); Holland Livestock Ranch, 52 IBLA 326, 350, 88 I.D. 275, 289 (1981); United States v. Melluzzo, 32 IBLA 46, 79 (1977), aff'd, Melluzzo v. Andrus, No. CIV 79-28-PHX-CAM (D. Ariz. May 20, 1978); United States v. Nelson, 28 IBLA 314, 329 (Judge Fishman dissenting); State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971). The basis for this deference is that the trier of fact who presides at the hearing has an opportunity to observe the witnesses and is in the best position to judge the weight to be accorded testimony. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973).

Appellant has failed to point out any specific errors in the Judge's decision, rather he has only expressed general dissatisfaction with it. It is clear that Judge Clark did not believe appellant's statements concerning his occupancy. The Judge's findings are supported by substantial evidence. His decision will not be disturbed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge